No. 97-1604

In The

Supreme Court of the United States

October Term, 1997

KNIGHTS OF THE KU KLUX KLAN and DAVID A. NEUMANN,

Petitioners,

vs.

DAVID C. HOLLISTER, MAYOR OF LANSING and CITY OF LANSING,

Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

JAMES D. SMIERTKA
City Attorney
BRIAN V. BEVEZ*
Assistant City Attorney
Attorneys for Respondents
5th Floor, City Hall
Lansing, Michigan 48933
(517) 483-4320

* *Counsel of Record*

146148

(800) 274-3321 • (800) 359-6859

A DIVISION OF COUNSEL PRESS

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COUNTER-QUESTION PRESENTED FOR REVIEW

Did the Michigan trial court, court of appeals and supreme court properly find that Respondents' simple request for injunctive relief based upon First Amendment time, place, and manner constraints did not cause a deprivation of Petitioners' First Amendment rights under 42 U.S.C. § 1983?

The Michigan trial court said:	Yes.
The Michigan Court of Appeals said:	Yes.
The Michigan Supreme Court said:	Yes.
Respondents say:	Yes.
Petitioners say:	No.

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OPINIONS BELOW

The December 30, 1997 Order of the Michigan Supreme Court denying Petitioners' request for leave to appeal is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 456 Mich. 915; 573 N.W. 2d 616 (1997). That order is reproduced in Petitioners' Appendix beginning at page 1a.

The April 4, 1997 opinion of the Michigan Court of Appeals is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan (After Remand)*, 222 Mich. App. 637; 564 N.W. 2d 177 (1997). That opinion is reproduced in Petitioners' Appendix beginning at page 3a.

The June 20, 1995 opinion of the Ingham County Circuit Court is not officially reported. That opinion is reproduced in Petitioners' Appendix beginning at page 19a.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals' decision was issued on April 4, 1997. Petitioners filed an Application for Leave to Appeal in the Michigan Supreme Court seeking discretionary review. That application was denied in an Order dated December 30, 1997 (Petitioners' App. 1a). This Court's jurisdiction is being invoked by Petitioners under 28 U.S.C. § 1257(a).

COUNTER-STATEMENT OF THE CASE

On June 6, 1994, the Knights of the Ku Klux Klan (KKK) applied for permission to conduct a rally on the grounds of Michigan's State Capitol on July 23, 1994. The KKK filed a request with the Michigan Capitol Committee; the committee created by Michigan law which is charged, to a limited extent,

with the responsibility of overseeing the capitol grounds. The request was approved by the Executive Director of the Michigan Capitol Committee in early June. Approval of this request followed a previous rally held by the KKK on April 23, 1994 on capitol grounds at which time the police department of the City of Lansing and other police agencies were present in a peacekeeping capacity.

On July 8, 1994, the City of Lansing and David Hollister, the mayor of the City of Lansing, filed a cause of action in the Ingham County Circuit Court against the KKK, Mr. Neumann, and others. In their Complaint, the City of Lansing and Mr. Hollister ("Respondents") sought an injunction "prohibiting and restraining the Defendants, their employees, agents, members and those in active concert with them from conducting, or allowing to be conducted, a Klan rally . . . on the State Capitol Grounds on July 23, 1994." The Complaint also requested that the rally be held at an alternate site, namely, Benjamin Davis Park located in the City of Lansing.

On July 18, 1994, the KKK and Mr. Neumann ("Petitioners") filed their Answer to the Complaint. Petitioners also filed a counterclaim in which they asserted that Respondents, by initiating and prosecuting their injunction action, were "seeking to restrain the exercise of [Petitioners'] state and federal constitutional rights to free speech, association, assembly and petition." The Petitioners' counterclaim contained a request for declaratory relief and damages under both the Michigan Constitution and the federal civil rights act, 42 U.S.C. §§ 1983 and 1988.

A hearing on the Respondents' Motion for Preliminary Injunction was held in the Ingham County Circuit Court on July 19, 1994. At that hearing, Respondents presented three witnesses, Mr. Hollister and two members of the City's police

force. These three witnesses testified concerning an earlier KKK rally at the state capitol conducted in April, 1994 and the rally scheduled to be held on July 23, 1994. Mr. Hollister is Respondents' mayor and also chief executive officer and chief law enforcement officer of the City of Lansing pursuant to municipal charter. The two members of the police force testifying were Rick Cook and James Rapp. Cook is a lieutenant and a twenty year veteran of Respondents' police force. He was qualified during the course of the hearing as an expert in the areas of police field force disposition and civil disorder. Rapp is a captain and a twenty-five year veteran of Respondents' police force. He was qualified during the course of the hearing as an expert in the field of intelligence and crowd control. The testimony of these three witnesses was consistent relative to the April 23 rally — the crowd was out of control; police security was breached; and there came a point in time that the police force had basically no control of the crowd. During that rally counter-demonstrators attempted to disrupt the KKK's activities. These witnesses also testified that they feared that there might be similar violence directed against the KKK by counter-demonstrators at the rally planned for July 23, 1994. On the basis of this fear of violence from counter-demonstrators, Respondents requested an injunction prohibiting Petitioners from conducting their rally at the state capitol. In addition, they requested that the location of the rally be changed to a nearby city park.

At the end of the July 19, 1994 hearing, the circuit judge orally announced that he would grant the request for a preliminary injunction:

> THE COURT: I've had occasion previously in this courtroom to refer to the case of *Clark versus Community for Creative Non-violence*, a 1984 decision of the U.S. Supreme Court. In that case,

the court ruled that reasonable restrictions as to the place, time, and manner of expression are constitutionally sufficient if justified without reference to the content of the speech to be expressed, and if narrowly tailored to serve a legitimate government interest, and to leave open ample alternative channels for communication.

Both sides have cited the case of *Christian Knights of the Ku Klux Klan versus District of Columbia*, a 1992 decision found at 972 F.2d 365, a decision of the District of Columbia circuit, and I find, indeed, the case is applicable, and its ruling is applicable, in this case given the peculiar facts of this case.

* * *

As I said, in that case no one disputed that a violent response was likely. The only issue was the ability of the police to control that violence . . .

So this morning, and this afternoon, this Court heard testimony on the question as to whether the police would have a reasonable chance of controlling violence at the state capitol if the rally were allowed to proceed at that location.

Captain Rapp testified, and his testimony was undisputed, that there were intelligence reports, and posters posted throughout the city which threatened escalated violence, and possibly deadly violence, by organized groups should the Klan rally.

Lieutenant Cook testified, and his testimony was undisputed, that the city was just barely able to avert

> a riot during the April rally — I should say at the end of the April rally — when the members of the Klan went into the capitol building, and this was with a field force of 500 officers, including 200 Lansing Police Department officers.
>
> He further testified that the city cannot muster a field force of anywhere near that size this coming Saturday. No testimony was elicited that would call this into question, no testimony was elicited that this was some phony budgetary excuse. Captain Rapp's testimony makes clear that there are grounds for expecting even worse attempts at violence by organized groups. All this evidence is undisputed.
>
> Furthermore, the city has provided an alternative site which its officials believe can be adequately policed, and the testimony is undisputed that any speakers sponsored by the Klan at that site would be able to communicate their message to each other as well as to members of the public. All of this evidence is undisputed.
>
> I believe that the city has met the standards stated by the Court of Appeals in *Christian Knights*, and unlike the trial judge in that case, the testimony in this case compels me to conclude that the city cannot adequately police or prevent crowd violence with the personnel available at the state capitol this coming Saturday. Therefore, I will grant the injunction prayed for by the city.

(July 19, 1994 TR of trial court opinion, pp. 2-6.)

Thereafter, Petitioners challenged the circuit court's injunctive decree in the Michigan Court of Appeals having filed

an emergency appeal in that court. On August 2, 1994, a panel of that Court issued an Order reversing the trial court's preliminary injunction. (Petitioners' App. 26a.) The Michigan Court of Appeals held that the circuit court's injunction infringed on Petitioners' exercise of their First Amendment rights in a quintessentially public forum and remanded the case to the circuit court for further proceedings.

Following remand to the circuit court, Petitioners filed a motion for partial summary disposition on the issues raised in their counterclaim. In that motion, Petitioners asserted that, because the Court of Appeals had ruled in its August 2, 1994 decision that the injunction obtained by Respondents had violated Petitioners' First Amendment rights, they were entitled to judgment with respect to the liability aspects of their § 1983 claim.

Respondents filed a response to the Petitioners' motion for partial summary disposition. In addition, Respondents filed their own motion for summary disposition, requesting that all of the claims stated in the Petitioners' counterclaim be dismissed.

Following briefing and oral argument on the motions, the circuit court issued a written Opinion and Order on June 20, 1995, granting Respondents' motion for summary disposition. (Petitioners' App. 19a.-25a.) In this regard, the circuit court said:

> The [Respondents'] petition to this Court did not request an order that would be unconstitutional . . . Instead, [Respondents] sought a restriction as to the place and time of a planned speech and demonstration. Such a restriction is not *per se* unlawful, as many cases have held, most prominently *Christian Knights of the KKK v. District of Columbia*, 973 F.2d 365 (1992).

(Petitioners' App., 19a.-20a.)

Petitioners then appealed the circuit court's decision dismissing their § 1983 and state constitutional claims to the Michigan Court of Appeals. Petitioners argued that the trial court's decision granting judgment as a matter of law to Respondents was in conflict with the Michigan Court of Appeals' August 2, 1994 Order which found that the injunction violated Petitioners' rights under the United States Constitution. During oral argument in the Michigan Court of Appeals, one of the three judges assigned to the case raised the question, presented here, of whether Respondents' conduct could be considered a proximate cause of Petitioners' injury or whether the source of that injury was solely the circuit court's issuance of an injunction.

On April 4, 1997, the Michigan Court of Appeals issued its decision in this case. *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 222 Mich. App. 637; 564 N.W. 2d 177 (1997). In that opinion, the court initially recognized that:

> The United States Supreme Court has recognized the validity under the First Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. *See*, *Madsen*, *supra*.

(Petitioners' App. 9a.) The Michigan Court of Appeals for this reason, and others, also held that Petitioners' causation argument was without merit. Based upon well-settled law, the Court of Appeals held that:

> . . . the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for purposes of § 1983 because any erroneous issuance of an injunction is the act of the *court*.

(Petitioners' App. 11a.) Moreover, the Court held that "the processes of *law* can be said to have caused any constitutional

violation resulting from an injunction." (Petitioners' App. 11a.) Importantly, it also held that "to transform judicial error into a basis of tort liability by an adversely affected litigant would chill legitimate access to courts." (Petitioners' App. 12a.) Finally, it recognized that "[t]he exercise of this independent judgment by the court, untainted by any misconduct on [Respondents'] part, constitutes the 'cause' of the constitutional violation at issue." (Petitioners' App. 18a.)

Taking exception with the Michigan Court of Appeals' decision, Petitioners sought leave to appeal the dismissal of their § 1983 claims in the Michigan Supreme Court. On January 30, 1997 the Michigan Supreme Court issued an Order denying Petitioners' application. (Petitioners' App. 1a.)

REASONS FOR DENYING THE WRIT

I.

THE MICHIGAN COURTS WERE ENTIRELY CORRECT IN FINDING THAT RESPONDENTS' LAWSUIT SEEKING INJUNCTIVE RELIEF BASED UPON FIRST AMENDMENT TIME, PLACE, AND MANNER CONSTRAINTS DID NOT CAUSE A DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. § 1983.

The singular argument presented here is one of causation and in simple terms is stated by Petitioners as follows:

> By seeking and successfully obtaining an injunction Respondent *caused* Petitioner to be subjected to a violation of First Amendment rights . . . sufficient for liability under § 1983. (Emphasis added.)

(Petition, p. 11.) Throughout the proceedings of this lawsuit, this argument has been routinely rejected by each judicial forum but, nevertheless, it has been continually reasserted by Petitioners on appeal.

Initially, Petitioners maintained that their counterclaim filed with the trial court was based upon a denial of their constitutional rights protected by § 1983. In this regard, they argued that:

> By seeking a circuit court injunction and succeeding on that claim, the [Respondents] *caused* the [Petitioners] to be subjected to a violation of First Amendment rights. (Emphasis added.)

(Application for Leave to Michigan Supreme Court, p. 17.) Carrying this argument further, Petitioners insisted that:

> . . . [Respondents] simply could not sustain a claim that the circuit court's decision granting an injunction constitutes a superceding *cause* of [Petitioners'] injury, thereby severing the causal relationship. (Emphasis added.)

(Application for Leave to Michigan Supreme Court, p. 22.) In support of this argument, Petitioners presented to the Michigan Supreme Court the same case law it presented to the Michigan Court of Appeals and, in this regard, suggested that the Court of Appeals "chose not to address [this issue]." (Application for Leave to Michigan Supreme Court, p. 17.) This suggestion is clearly disingenuous. The Court of Appeals did address this issue in detail and with much discussion.

In this regard, the Court initially addressed the issue of causation which applies to Respondents as a municipality under § 1983:

> Proper analysis of a § 1983 claim against a municipality requires examination of two issues: "(1) whether plaintiff's harm was *caused* by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. Harker Heights*, 503 U.S. 115, 120; 112 S. Ct. 1061; 117 L. Ed. 2d 261 (1992). (Emphasis added.)

(Petitioners' App. 7a.) Having stated the applicable federal standard, the Court then observed:

> [Petitioners] also cite a number of federal cases involving § 1983 causation issues. All involve police officers who either provided misleading information or failed to provide relevant exculpatory information in pursuing criminal charges and argued that they were not responsible for any constitutional deprivations because other parties, *e.g.*, prosecutors, intervened.
>
> * * *
>
> These cases involve factual misrepresentations by police officers to the parties responsible for deciding whether to proceed with criminal charges or whether there is sufficient evidence to issue arrest or search warrants.
>
> * * *
>
> The essential point of these cases is that where the officers' misconduct *taints* the legal process, decisions bearing that *taint* cannot insulate the officer from liability. (Emphasis added.)

(Petitioners' App. 13a-15a.) In conclusion, the Court held:

> Here, [Respondents'] pursuit of the injunction, which was ultimately determined to be over broad, did not *taint* the legal process. [Respondents] did not engage in any wrongdoing. [Respondents] did not make misrepresentations that would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion. [Respondents] simply made the colorable argument that their proposed injunction was warranted under the undisputed facts relating to the previous Klan rally. [Respondents'] attorney, exercising "reasonable professional judgment," *Malley*, at 346, could have responsibly concluded that the request for preliminary injunctive relief was justified by the facts and the law. Further, the proceedings were not ex parte. They were conducted adversarially, as required by MCR 3.310(A)(1); both parties had a full opportunity to proffer evidence, to contest proofs advanced by the other and to argue their respective positions. (Emphasis added.)

(Petitioners' App. 17a.)

In short, the Court of Appeals correctly held that Petitioners' causation claim under § 1983 was clearly misplaced given the absence of any supporting law. Moreover, given the undisputed facts elicited before the trial court in an adversarial hearing, there were no misrepresentations which could even begin to "taint" the legal process. Instead, Respondents' actions in seeking injunctive relief:

> . . . consisted exclusively of availing [itself] of the legal process to try to limit the location of [Petitioners'] rally. The United States Supreme Court has recognized the validity under the First

> Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. *See, Madsen v. Women's Health Center*, 512 U.S. 753; 114 S. Ct. 2516; 129 L. Ed. 2d 593 (1994). Here, [Respondents], having some reason to anticipate violence, attempted to strike at its preemptively by pursuing an injunction to limit the place of the planned rally to a more easily defended location. [Respondents] presented a colorable claim that their proposed injunction constituted an appropriate time, place, or manner restriction on [Petitioners'] First Amendment rights and sought a court ruling on the issue.

(Petitioners' App. 8a-9a.)

By availing itself of this legal process under *Madsen*, *supra* and its progeny[1] Respondents sought merely to exercise its own First Amendment rights. By no means did it cause or deprive these same First Amendment rights guaranteed to others. This much is fundamentally clear as was recognized by the Michigan Court of Appeals. Citing *Collins v. Harker Heights*, 503 U.S. 115, 120 (1992) the Court of Appeals stated the pertinent applicable causation standard which is relevant here:

> . . . whether plaintiff's harm was caused by a constitutional violation . . .

Id., p. 120. Given the present factual and legal context presented, the Court of Appeals concluded that Respondents' filing of an action merely seeking injunctive relief was not a

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1. *See also RAV v. St. Paul*, 505 U.S. 377 (1992); *Ward v. ROCH Against Racism*, 492 U.S. 781 (1989); *Clark v. Community for Creative Non Violence*, 468 U.S. 288 (1984); *Christian Knights of KKK v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992).

deprivation of any purported constitutional deprivation under § 1983:

> Moreover, a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant *would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 896-897; 104 S. Ct. 2803; 81 L. Ed. 2d 732 (1984); *Moore v. Fragatos*, 116 Mich. App. 179, 185, n 3; 321 N.W.2d 781 (1982). Allowing a damages remedy here would elevate [Petitioners'] undeniable First Amendment rights over those of [Respondents], when both sides here have call on the protections and guarantees of the Constitution. We believe that it would chill the right of access to the courts to make a litigant who invokes judicial remedies, in other than a frivolous proceeding, liable for damages for judicial error. No litigant, given a judicial free of corruption and bias, has control over judicial actions. (Emphasis added.)

(Petitioners' App. 12a.)

Simply stated, the Michigan Court of Appeals was correct. Respondents under the First Amendment and well-recognized time, place and manner constraints had the absolute right to seek access to the courts. Nonetheless, Petitioners insist that this right was the causative factor which led to a purported violation of their First Amendment rights. This begs the question — if one legally accesses a court in an adversarial hearing under the First Amendment, can he or she be punished under the same amendment for doing so? Unequivocally, the answer is no. Under the facts and law presented here, Petitioners' causation argument is clearly misplaced.

Nonetheless, Petitioners are persistent in this regard. Citing Restatement (Second) of Torts and other authority, they maintain that:

> Under these basic common law principles, the Michigan Court of Appeals' determination that the actions of Respondents were not a proximate cause of Petitioners' constitutional injuries cannot be sustained.

(Petition, p. 15.) Presumably in support of this argument, Petitioners insist that:

> . . . Respondents cannot sustain a claim that the [trial court's] decision granting an injunction constitutes *the* cause or a superseding cause of the Respondents' injuries, thereby severing the causal relationship. (Emphasis supplied by Petitioners.)

(Petition, pp. 14-15.) Again, this causation argument is flawed for at least two reasons.

First, the Michigan Court of Appeals recognized that both under federal and state law the issuance of an injunction is an act "caused" by the court, erroneous or otherwise, and not an act "caused" by the party seeking the injunction. In this regard, the Court of Appeals aptly summarized the context of Petitioners' causation argument:

> The direct "cause" of the constitutional violation here was the court's issuance of the overbroad injunction, not [Respondents'] pursuit thereof. If the court had denied the injunction, there would have been no constitutional violation. However, [Petitioners] argue that [Respondents] "caused" the constitutional

> violation because the court would not have issued the overbroad injunction unless [Respondents] had requested it. In other words, "but for" [Respondents'] lawsuit, the court would not have been prompted into taking its action.

(Petitioners' App. 10a.) Despite this "but for" argument, the Court of Appeals correctly held that:

> Under federal law, the general rule is that if an injunction issues erroneously, any resulting irreparable injury is not redressable because the error was an act of the court, not of the party who sought the injunction. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union*, 471 F.2d 872, 876 (CA 6, 1972). Similarly, in Michigan, at common law the general rule is that there is no tort liability for wrongfully suing out an injunction. *In re Pritchard Estate*, 169 Mich. App. 140, 149; 425 N.W.2d 744 (1988).

(Petitioners' App. 10a.) In short, the trial court's issuance of an erroneous injunction is the "cause" of any alleged injury arising therefrom. It is not a litigant's pursuit thereof.

In a broader sense, it is the operation of law itself that is the purported "causative" factor of any alleged wrongdoing.

> More generally, the processes of the *law*, can be said to have caused any constitutional violation resulting from an injunction. Here, the circuit court sought to interpret § 1983, the First Amendment, and the law concerning injunctions. The circuit court did nothing more than give voice to this law. That, in view of this Court, it ultimately erred in its interpretation

> does not alter the fact that it was the operation of the *law* itself that caused any resulting harm to defendants. Our legal system fully contemplates that courts will sometimes act in error and that such error will need to be corrected through an appellate process. Const. 1963, art. 6, § § 1, 8 and 13. That such appellate process must be invoked before an error can be corrected does not mitigate the fact that it is the law itself that is working its effected upon the parties, not the will of the individual judge, much less that of the party initiating resort to the legal process. The law itself is responsible for the consequences of its operation, not the litigant who avails himself of the law.

(Petitioners' App. 11a.-12a.)

Moreover, Petitioners' argument is flawed because the mere filing of a complaint seeking injunctive relief, if found actionable, would chill any litigants right of access to a court of competent jurisdiction which serves to redress First Amendment violations, or constraints, as Respondent did here. This was clearly recognized by the Michigan Court of Appeals.

> . . . a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897; 104 S. Ct. 2803; 81 L.Ed.2d 732 (1984) . . .

(Petitioners' App. 12a.) The right of access to the courts is not a novel concept.

This Court has held that "the right of access to the courts is indeed but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right to petition is "among the most precious of the liberties safeguarded by the Bill or Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). This right has a "sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As an aspect of the First Amendment right to petition, the right of access to the courts shares this "preferred place" in our hierarchy of constitutional freedoms and values. To this legal end, federal courts have consistently held that the constitutional right of access to the courts "cannot be impaired, either directly . . . or indirectly, by threatening or harassing [anyone] in retaliation for filing lawsuits". *Sanders v. St. Louis County*, 724 F.2d 665, 666 (8th Cir. 1983).

Given this body of law, it is clear that Respondents' "right of access to the courts" to seek injunctive relief based upon well-settled First Amendment time, place and manner constraints is undeniable. However, if this Court were to accept Petitioners' argument that the mere filing of a lawsuit seeking such injunctive relief was actionable, Respondents' First Amendment "right of access to the courts" would not only be chilled, but effectively denied. In other words, neither Respondent nor any other litigant under the same circumstances would request relief from an independent factfinder, despite well-established law and the unrefutable evidence it can present. The reason is clear — if you lose the case despite the best intentions of policymakers based upon colorable law, you will, as a matter of law, pay exorbitant costs, disbursements, and attorney fees for merely asserting your First Amendment rights on behalf of those persons you are duty-bound to protect. This was clearly not the intent underlying the federal constitution; the Michigan constitution; nor, was it the intent underlying the enactment of 42 U.S.C. § 1983.

CONCLUSION

Based upon the foregoing discussion, the instant Petition should be summarily dismissed. The causation issue presented here is without merit, and if applied, would render ineffective well-established First Amendment time, place, and manner constraints. Also, it would render firmly established law attendant to injunctive relief previously decided by this Court equally ineffective. In addition, Petitioners failed to discuss any official policy or custom demonstrating a causal responsibility for a constitutional deprivation. This failure is fatal to Petitioners' claim for relief. Finally, the issues raised here are neither imperative to public importance nor do these issues involve legal principles of major significance to this nation's jurisprudence. Dismissal of this Petitioner is in order.

Respectfully submitted,

JAMES D. SMIERTKA
City Attorney
BRIAN W. BEVEZ*
Assistant City Attorney
Attorneys for Respondents
5th Floor, City Hall
Lansing, Michigan 48933
(517) 483-4320

* *Counsel of Record*